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6 **IN THE UNITED STATES DISTRICT COURT**
7 **DISTRICT OF GUAM**

8 **UNITED STATES OF AMERICA,**

9 Plaintiff,

10 vs.

11 **MARK ANTHONY BARTOLOME,**

12 Defendant.
13

Criminal Case No. 08-00018-2

ORDER RE: SEVERANCE OF TRIAL

14 This case is before the court on the Government's objections to the Order by the United
15 States Magistrate Judge directing that the charges against Defendant be tried in two separate
16 proceedings: one for Counts I-III (Conspiracy to Smuggle Bulk Cash Out of the United States,
17 Bulk Cash Smuggling Out of the United States, and Forfeiture Allegation), and another for Count
18 IV (Importation of Methamphetamine Hydrochloride). *See* Docket Nos. 68, 76. On the basis of
19 the parties' arguments and presented authorities, the court hereby **SUSTAINS** the Government's
20 objections.

21 **I. FACTUAL BACKGROUND**

22 On the morning of February 28, 2008, Ernesto P. Verdera and Defendant Mark A.
23 Bartolome, traveling together, arrived at Guam's A.B. Won Pat International Airport to board a
24 Philippine Airlines flight that was scheduled to depart Guam at 6:00 a.m. and was destined for
25 Manila, Philippines. *See* Docket No. 76 at 2:21-24. Upon inspecting their baggage, authorities
26 discovered a large amount of bundled cash, later valued at \$810,631. *See id.* at 2:24-3:13; 4:19-
27 21. Authorities also discovered "[d]rug paraphernalia and methamphetamine hydrochloride,
28 packaged in two small plastic bags and with an aggregate weight of 1.33 grams." *Id.* at 3:13-14.

1 During subsequent questioning, Defendant Bartolome stated that he smokes methamphetamine
2 and that he had placed “about a gram” of the drug in the baggage, for his personal use. *Id.* at
3 4:14-16.

4 **II. PROCEDURAL BACKGROUND**

5 On February 28, 2008, the Government filed a complaint charging both Ernesto P.
6 Verdera and Defendant Mark A. Bartolome with the offense of Bulk Cash Smuggling Out of the
7 United States, in violation of 31 U.S.C. § 5332. *See* Docket No. 1. The complaint also contained
8 a Forfeiture Allegation seeking surrender of the cash involved in the offense.

9 On March 5, 2008, the grand jury returned an indictment, charging both Ernesto P.
10 Verdera and Defendant Mark A. Bartolome with the same offense contained in the Complaint.
11 *See* Docket No. 13.

12 On April 22, 2008, Verdera moved Magistrate Judge Joaquin V.E. Manibusan, Jr., to
13 sever his trial from that of Defendant Bartolome. *See* Docket No. 29. Verdera argued that
14 Defendant Bartolome’s oral statements, which the Government intended to introduce at the trial
15 through the agent who had interviewed Defendant Bartolome, would prejudice him, as he would
16 not be able to confront and cross-examine his non-testifying then-co-defendant. Thus, Verdera
17 contended that severance was proper under *Bruton v. United States*, 391 U.S. 123 (1968).

18 On May 1, 2008, the grand jury returned a superseding indictment, charging both
19 defendants with: Conspiracy to Smuggle Bulk Cash Out of the United States (Count I); Bulk
20 Cash Smuggling Out of the United States (Count II); and Forfeiture Allegation (Count III). *See*
21 Docket No. 34. There was also a charge of Importation Methamphetamine Hydrochloride (Count
22 IV), leveled only against Defendant Bartolome.

23 On April 28, 2008, the Government opposed Verdera’s motion. *See* Docket No. 31.
24 The Government argued that severance was not required because it could sufficiently protect
25 Verdera’s Sixth Amendment rights by a combination of redactions and limiting instructions.

26 On May 5, 2008, Verdera filed his reply brief. *See* Docket No. 44. In addition to dealing
27 with the *Bruton* issue, Verdera argued for severance of the new methamphetamine hydrochloride
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1 importation charge leveled against Defendant Bartolome, because the evidence to be introduced
2 as a result of that new charge would “spill over” to him and significantly prejudice him in the
3 jury’s eyes.

4 On May 9, 2008, Magistrate Judge Manibusan heard oral argument on the motion. *See*
5 Docket No. 45. Defendant Bartolome had neither joined the motion to sever nor opposed it.
6 Accordingly, his then-counsel, William Gavras, did not appear at the hearing. After some
7 argument was presented, Magistrate Judge Manibusan continued the matter briefly to permit the
8 Government to file a supplemental memorandum addressing Verdera’s second argument
9 regarding the spillover effect of Count IV. Also, Magistrate Judge Manibusan wanted to give
10 the Government and Verdera an opportunity to meet and discuss possible redaction of Defendant
11 Bartolome’s statements.

12 On May 23, 2008, the Government filed its Supplemental Response (Docket No. 46) and
13 Proposed Redactions to Bartolome’s statements (Exhibit A thereto). On May 30, 2008, Verdera
14 replied to the Government’s response. *See* Docket No. 51.

15 On June 6, 2008, the parties again appeared before Magistrate Judge Manibusan. *See*
16 Docket No. 53. At the judge’s request, Mr. Gavras also attended the hearing on behalf of
17 Defendant Bartolome. Magistrate Judge Manibusan stated that the court was concerned that the
18 redactions proposed by the Government and Verdera might interfere with Mr. Gavras’s defense
19 of Defendant Bartolome, specifically Defendant Bartolome’s ability to cross examine the agent
20 about the statements allegedly made by him. At counsel’s request, Magistrate Judge Manibusan
21 continued the matter once again to permit Defendant Bartolome to file a brief on the matter and
22 to permit the Government a response to Defendant Bartolome’s filing.

23 On June 16, 2008, Defendant Bartolome filed an objection to the Government’s proposed
24 redactions. *See* Docket No. 54. Thus, his argument concerned only the *Bruton* issue. On June
25 23, 2008, the Government filed a response to Defendant Bartolome’s objection. *See* Docket No.
26 59. Magistrate Judge Manibusan heard final argument from the parties on June 25, 2008.

27 On July 2, 2008, Magistrate Judge Manibusan granted Verdera’s motion in its entirety.
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1 See Docket No. 68. As such, the one trial became three trials: (1) a trial for Verdera on Counts I-
2 III; (2) a trial for Defendant Bartolome on Counts I-III; and (3) a trial for Defendant Bartolome
3 on Count IV.

4 On August 1, 2008, the United States filed objections to Magistrate Judge Manibusan's
5 order. See Docket No. 76. However, these objections address *only* the severance of Defendant
6 Bartolome's trial on Count IV from his trial on Counts I-III. The United States did not object to
7 the ordering of separate trials for the two Defendants.

8 On December 19, 2008, Defendant Bartolome filed a response to the objections of the
9 United States. See Docket No. 87.

10 On January 22, 2009, the court heard argument on the propriety of the severance of the
11 counts against Defendant Bartolome into two trials. See Docket No. 94.

12 The court ordered further briefing on March 18, 2009. See Docket No. 164. The parties
13 filed their final briefs on the severance issue on March 27, 2009. See Docket Nos. 166, 168.

14 **II. STANDARD OF REVIEW**

15 A district judge may reconsider a Magistrate Judge's order on a non-dispositive pretrial
16 motion if the order was "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A). See
17 also Fed. R. Civ. P. 72(a) (in reviewing a Magistrate Judge's order on a non-dispositive pretrial
18 motion, district judge "must . . . modify or set aside any part of the order that is clearly erroneous
19 or is contrary to law."). Under this standard, the magistrate judge's order should be affirmed
20 unless the district court is left with the "definite and firm conviction that a mistake has been
21 committed." *Burdick v. Comm'r*, 979 F.2d 1369, 1370 (9th Cir. 1992). Conversely, the
22 reviewing court may not simply substitute its judgment for that of the deciding court. *Grimes v.*
23 *City & County of San Francisco*, 951 F.2d 236, 241 (9th Cir. 1991).

24 **III. ANALYSIS**

25 Rule 8(a) permits joinder of offenses in a single trial against a defendant, if the offenses
26 charged in the indictment are: (1) "of the same or similar character;" (2) "based on the same act
27 or transaction;" or (3) "connected with or constitut[ing] parts of a common scheme or plan."

1 Fed. R. Crim. P. 8(a). Rule 8 is “broadly construed in favor of initial joinder [of offenses].”
2 *United States v. Jawara*, 474 F.3d 565, 573 (9th Cir. 2007) (quoting *United States v. Friedman*,
3 445 F.2d 1076, 1082 (9th Cir. 1971)). Finally, when deciding the propriety of joinder, courts
4 should look only to the allegations in the indictment. *Id.* at 572 (quoting *United States v. Terry*,
5 911 F.2d 272, 276 (9th Cir. 1990) and citing *United States v. VonWillie*, 59 F.3d 922, 929 (9th
6 Cir. 1995)).

7 Here, the Magistrate Judge clearly erred by applying these test factors (1) without setting
8 forth the Ninth Circuit’s background policy preference in favor of initial joinder of offenses, and
9 (2) without looking to any cases construing the test factors. Essentially, the Magistrate Judge
10 purported to analyze these test factors in an interpretive vacuum: the legal standards that Ninth
11 Circuit courts have laid down to guide analysis of these factors are not cited in the order. Thus,
12 there is no evidence that the factors were properly analyzed, indicating clear error.

13 For example, a leading Ninth Circuit case construing Rule 8’s “same or similar character”
14 test factor is *United States v. Fiorillo*, 186 F.3d 1136 (9th Cir. 1999). *Fiorillo* was based on an
15 indictment charging wire fraud, violations of the Resource Conservation and Recovery Act
16 (“RCRA”), and receiving Class A explosives without a permit. *Id.* at 1143. The Ninth Circuit
17 affirmed the District Court’s decision not to sever the explosives counts because

18 the explosives and hazardous materials were both stored in the
19 same warehouse, the discovery of the explosives led to the
20 discovery of the hazardous materials, and both the explosives and
21 the hazardous material were being stored without proper permits.
22 All of these facts indicate that the explosives charges and the
23 hazardous material charges were *of similar character*, meeting the
requirements of Rule 8(a). Additionally, at least three witnesses
testified at the trial concerning both the explosives and the
hazardous waste. The district court did not err in concluding that
joinder of the charges was proper.

24 *Id.* at 1145 (emphasis added). Thus, *Fiorillo* establishes that the “same or similar character” test
25 factor may be satisfied where the evidence underlying different charges was (1) stored and
26 discovered in the same location; (2) similarly contraband (*i.e.*, held without a permit, or illegal);
27 and (3) “overlapping” in the sense that the same witnesses will testify about it.

1 Had the Magistrate Judge discussed *Fiorillo* and then decided, in *Fiorillo*'s light, that
2 Defendant Bartolome's offenses were not of "same or similar character," the court would be
3 hard-pressed to find clear error (though it may have decided things differently on *de novo*
4 review). Instead, the Magistrate Judge simply laid out the elements of the offenses and then
5 decided, upon "comparison of [their] essential elements," that they were "not of the same or even
6 similar character." Docket No. 68 at 4:23-5:22. This constitutes clear error in two ways. First,
7 the decision appears legally unconstrained, because the Magistrate Judge did not cite *Fiorillo* (or
8 any other case) in reaching it. Second, the comparison-of-elements method is inconsistent with
9 *Fiorillo*, because that method would almost certainly have led to a different decision in that
10 case—the essential elements of wire fraud and receiving Class A explosives being, naturally,
11 unlike each other.

12 In short, the Magistrate Judge clearly erred by (1) making the decision without citing any
13 applicable case law, and (2) reaching the decision upon reasoning apparently inconsistent with
14 such case law.

15 **IV. CONCLUSION**

16 Given the foregoing analysis, the Government's objection is **SUSTAINED**. Trial in this
17 case is hereby set for 9:30 a.m. on Tuesday, April 28, 2009. The final pre-trial conference and
18 hearing on all motions shall be held at 1:30 p.m. on Monday, April 27, 2009. All trial documents
19 are due by 3:00 p.m. on Wednesday, April 22, 2009.

20 **SO ORDERED.**



/s/ Frances M. Tydingco-Gatewood
Chief Judge
Dated: Apr 17, 2009